R THANGARATNAM VYTHILINGAM A

v.

VINAYAGAMOORTHY RAJARATNAM & ORS

COURT OF APPEAL, PUTRAJAYA B
ABDUL AZIZ MOHAMAD FCJ
JAMES FOONG JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NO: N-02-135-1995]
28 SEPTEMBER 2007 C

LAND LAW: *Transfer - Validity of - Transfer of property to grandson when mother only consented to transfer of property to son - Whether son was authorised to transfer property to his son when he was only authorised to transfer property to himself - Whether authority given was a gift from a mother to her son - Whether son was entitled to have property transferred to anyone he nominated* D

TRUSTS: *Transfer of property - Validity of - Transfer of property to grandson when mother only consented to transfer of property to son - Whether son was authorised to transfer property to his son when he was only authorised to transfer property to himself - Whether authority given was a gift from a mother to her son - Whether son was entitled to have property transferred to anyone he nominated* E

The appellant (deceased) was residing in Sri Lanka when she consented to transfer her property to her son (the 1st respondent) who was residing in Malaysia. That was conveyed in her letter dated 23 December 1983 to him. The property in question was a piece of land in the District of Seremban, Negeri Sembilan ('the said property'). The appellant had executed a general power of attorney ('PA') in favour of the 1st respondent to effect the said transfer. The PA was subsequently registered with the High Court of Malaya. The 1st respondent transferred the said property to his son, the 3rd respondent, who was also the grandson of the appellant. The appellant disagreed with the said transfer and filed an action in court. She claimed, *inter alia*, for a re-transfer of the said property to her and that the transfer to the 3rd respondent was *ultra vires* as she had never given consent. She also claimed that the transfer was wrongful and fraudulent. The High Court dismissed the appellant's claim on the grounds that the 1st respondent was not restricted to transfer the said property straight to his son. Also, although the power of attorney did not give the F G H I

A 1st respondent authority to transfer the said property to himself, the appellant's letter of 23 December 1983 overrode that shortcoming. The appellant now appealed and was substituted in this appeal by the administrator of her estate who was also her son. It was submitted on behalf of the appellant that the learned B judge erred when he held that the appellant's letter provided extra power to the 1st respondent to transfer the said property.

Held (dismissing the appeal)
Per Abdul Aziz Mohamad FCJ:

C **(1)** The appellant's submission on the first issue whether the PA could be varied by the letter of 23 December 1983 was aimed at showing the existence of fraud in the civil sense. That question was misconceived. Also, there was no fraud, whether civil or criminal. (para 5)

D **Per James Foong JCA:**

(1) The authority for the 1st respondent to transfer the said property was not grounded on the PA. It came from the E appellant's letter to the 1st respondent dated 23 December 1983 which authorised the 1st respondent to transfer the said property to himself. The PA was only an instrument to arm the 1st respondent with the power to execute the memorandum of transfer of the said property. (para 21)

F **(2)** There was no issue of the appellant's letter of 23 December 1983 providing "extra power" to the 1st respondent to transfer the said property. The 1st respondent was already equipped with the authority to transfer the said property *via* the appellant's letter of 23 December 1983 and used the PA G to give full effect to the said transfer. The learned judge relied on the wrong sequence of facts. (para 21)

(3) The main crux of the appellant's claim was whether the 1st respondent could transfer the said property to his son rather H than the manner in which it was done. On that issue the court agreed with the learned judge that once the appellant had given the authority to the 1st respondent to transfer the said property to himself, the 1st respondent had every right to have the said property transferred to whoever he had I nominated. The authority given by the appellant to the 1st respondent amounted to a gift by a mother to her son and

once given, the son could elect to nominate anyone to be the registered proprietor. The appellant could not object to that. As the answer to that issue was against the appellant, the learned trial judge had not erred in finding against the appellant. (para 22)

Bahasa Malaysia *Translation Of Headnotes*

Perayu (simati) tinggal di Sri Lanka apabila beliau bersetuju untuk memindahkan hartanahnya kepada anak lelakinya (responden pertama) yang tinggal di Malaysia. Persetujuan itu disampaikan melalui satu surat bertarikh 23 Disember 1983 kepada anaknya itu. Hartanah berkenaan adalah sebidang tanah di Daerah Seremban, Negeri Sembilan ('hartanah tersebut'). Perayu juga telah memeterai satu suratkuasa wakil am ('PA') untuk manfaat responden pertama melaksanakan pindahmilik tersebut, dan PA telah didaftarkan di Mahkamah Tinggi Malaya. Kemudian, responden pertama telah memindahmilikkan hartanah tersebut kepada anaknya, responden ketiga, iaitu cucu perayu. Perayu tidak bersetuju dengan pindahmilik ini dan berikutnya telah memfailkan tindakan di mahkamah. Antara lain, perayu memohon perintah bahawa pindahmilik hartanah tersebut kepada responden ketiga adalah *ultra vires* kerana ketiadaan persetujuannya, dan supaya hartanah tersebut dikembalikan kepadanya. Mahkamah Tinggi menolak tuntutan perayu atas alasan bahawa tiada sekatan atas responden pertama untuk memindahmilikkan hartanah tersebut terus kepada anaknya. Juga, walaupun suratkuasa wakil tidak memberi responden pertama kuasa untuk memindahmilik hartanah tersebut kepada dirinya sendiri, kekurangan itu telah ditampung oleh surat perayu bertarikh 23 Disember 1983. Perayu merayu dan di rayuan ini beliau telah diganti oleh pentadbir pusakanya yang juga seorang anak lelakinya. Dihujahkan bagi pihak perayu bahawa yang arif hakim khilaf bilamana memutuskan bahawa surat perayu di atas telah memberikan kuasa tambahan kepada responden pertama untuk memindahmilikkan hartanah tersebut.

Diputuskan (menolak rayuan)
Oleh Abdul Aziz Mohamad HMP:

(1) Hujah perayu mengenai isu pertama sama ada PA boleh diubah oleh surat bertarikh 23 Disember 1983 bertujuan menunjukkan wujudnya fraud dalam rangka undang-undang sivil. Persoalan ini telah disalahbawa. Tidak ada fraud, sama ada berbentuk sivil mahupun jenayah.

A **Oleh James Foong HMR:**

(1) Kuasa responden pertama untuk memindahmilikkan hartanah tersebut bukan berasaskan PA. Ianya datang dari surat perayu kepada responden pertama bertarikh 23 Disember 1983 yang
B membenarkan responden pertama memindahmilikkan hartanah tersebut kepada dirinya sendiri. PA hanyalah satu instrumen untuk memperkasakan responden pertama dengan kuasa untuk melaksanakan memorandum pindahmilik hartanah tersebut.

C **(2)** Tiada isu berbangkit mengenai surat perayu bertarikh 23 Disember 1983 memberikan "kuasa tambahan" kepada responden pertama untuk memindahmilikkan hartanah tersebut. Responden pertama sudahpun mempunyai kuasa untuk memindahmilik hartanah tersebut, iaitu melalui surat bertarikh
D 23 Disember 1983 dan telah menggunakan PA untuk memberikan kesan sebenar kepada pindahmilik tersebut. Yang arif hakim telah bergantung kepada rentetan fakta yang salah.

(3) Teras utama tuntutan perayu adalah sama ada responden pertama boleh memindahmilikkan harta tersebut kepada
E anaknya dan bukannya cara bagaimana pindahmilik itu dilakukan. Atas isu ini, mahkamah bersetuju dengan yang arif hakim bahawa sebaik sahaja perayu memberikan kuasa kepada responden pertama untuk memindahmilikkan hartanah tersebut kepada dirinya sendiri, maka responden pertama mempunyai
F segala hak untuk memindahmilikkan hartanah tersebut kepada siapa sahaja yang dikehendakinya. Kuasa yang diberikan oleh perayu kepada responden pertama adalah satu pemberian oleh seorang ibu kepada anaknya, dan sebaik pemberian itu dilaksanakan, si anak boleh memilih siapa sahaja untuk menjadi
G pemilik berdaftarnya. Perayu tidak boleh membantah terhadap perkara itu. Oleh kerana jawapan kepada isu di sini adalah menentangi perayu, maka yang arif hakim tidak khilaf apabila memutuskan dengan tidak memihak kepada perayu.

H **Case(s) referred to:**
Reckitt v. Barnett, Pembroke & Slater Ltd [1929] AC 176 ***(refd)***

Legislation referred to:
National Land Code, ss. 309, 310, 311, 340
Poer of Attorney Act 1949, s. 3(1)(a)

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For the appellant - Sri Dev Nair (Nora Hayati & B Sivaruben with him); M/s Nora Hayati & Assoc
For the respondents - AD Rajah (CS Khoo with him); M/s AD Rajah

[Appeal from High Court, Seremban; Civil Suit No: 22-158-1989]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad FCJ:

[1] Having read in draft the grounds of judgment of my learned brother James Foong JCA, I feel obliged to say a few words for my part.

[2] In his oral submission in the appeal, the appellant's counsel indicated that he would be submitting on two issues, the first issue being whether the power of attorney that the appellant granted to the first respondent, her son, could be varied or altered by the appellant's letter dated 23 December 1983, by which she asked the first respondent to transfer the land into his name and which her counsel said could not amount to a variation of the power of attorney.

[3] As for the second issue, the appellant's counsel said that it would concern the question of the burden of proof on the appellant to prove fraud, the fraud being, counsel said, in the transference of the land into the first appellant's name as trustee for his son the third respondent. It is a fact that in para. 6 of the statement of claim the appellant's case was one of fraud on the part of the first respondent. It is also a fact that in paras. 7 and 8 of the statement of claim the appellant's case was also one of conspiracy on the part of the first and fourth respondents to cheat and defraud the appellant, in which the main allegation was that the appellant's letter of 23 December 1983 was a forgery devised by the fourth respondent, the first respondent's brother, the action against whom was, however, withdrawn upon his demise. And it was obvious from the memorandum of appeal that the appellant was not taking up in the appeal the question of conspiracy-forgery but only the question of variation of the power of attorney by the letter of 23 December 1983. The appellant's counsel said that the need to prove fraud related to s. 340 of the

A National Land Code. According to subsection (2)(a) of the section, the first defendant's title to the land as trustee for the third respondent would become defeasible if he was party to a fraud in his getting on the title. Counsel said that the trial judge applied the criminal burden. Obviously he intended to show when
B coming to submit on the second issue that the civil burden should have been applied.

[4] After hearing the appellant's counsel in elaboration of the first issue, in which the facts of the case were glimpsed, we
C decided, after a half-hour recess, to dismiss the appeal without hearing counsel on the second issue and without hearing the respondents' counsel, the reason that was announced being that after hearing the submission of the appellant's counsel on the first issue we were of the view that there was no fraud, whether civil
D or criminal.

[5] It seemed to me that the appellant's submission on the first issue, whether the power of attorney could be varied by the letter of 23 December 1983, was aimed at showing the existence of
E fraud in the civil sense. I thought that the question was misconceived, my reasons being the same as those for which my learned brother says at the end of the first paragraph under his "Analysis": "So the question of 'extra power' through the appellant's letter dated 23 December 1983 to be loaded onto the
F Power of Attorney does not arise". As for my finding that there was no fraud, whether civil or criminal, my reasons were as stated in my learned brother's second paragraph under his "Analysis".

James Foong JCA:

G **Introduction**

[6] The appellant passed away on 1 September 1995. Her son, one Balasekaran a/l Rajaratnam, is the administrator of her estate. He has substituted her in this appeal.

H **[7]** The 1st respondent has also passed away on 19 May 1995 and is substituted in this appeal by his administratix, one Agilesvary w/o Vinayagamoorthy.

[8] The 4th respondent has also passed away and the appellant,
I before her demise, had discontinued this suit against the estate of the 4th respondent on 21 September 1992.

[9] The parties in this appeal are all related. They are of Ceylonese origin. The appellant was the mother of the 1st and 4th respondents. The 3rd respondent was her grandson and the son of the 1st respondent. The 2nd respondent is also the 1st respondent but in the capacity as trustee for the 3rd respondent. At all material times, the appellant resided in Sri Lanka while the 1st respondent lived in Malaysia.

[10] The appellant had a piece of land held under Grant No. 1199 for Lot No. 392, Mukim Rasah, Daerah Seremban, Negeri Sembilan (the said property). Regarding this said property, the appellant and the 1st respondent corresponded with each other as follows:

[11] On 19 September 1983, the 1st respondent in a letter to the appellant requested:

> Mother, I have already write to you about the land in Seremban. Previously you have asked my opinion. Mother, since the land is under your name, I will do as what you instruct me to do. In my view it could be transferred to any one's name.

[12] The appellant responded on 19 October 1983:

> At first, I thought of transferring the property in Seremban to Bala (another son of the appellant), but seeing his behaviour when he came down here, I had no intention to do so. However I still consider because I have love for him. I'm writing for your answer and let me know your intention. At one time I feel like transferring the property to his name and another time I think no need. Please write your opinion.

[13] On 5.12.1983, the 1st respondent gave his opinion:

> Mother, I had wrote to you earlier about Seremban land. You ask me about my opinion. This land was bought by father with his earning and he transferred it to your name as he wished. So you can transfer as you wish. If you ask my view, I could say that, as the elder son to you, I'm requesting the land title to be transferred to my name. What is your intention?

[14] The appellant replied the 1st respondent on 23 December 1983:

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> We received your letter and understood the contents.
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> Transfer the property in Seremban to your name. But, till I am alive let me have the profit.

B **[15]** Subsequent to this letter, the appellant forwarded to the 1st respondent a general Power of Attorney (the Power of Attorney) which she granted in favour of the 1st respondent. Though this Power of Attorney was executed by the appellant in Sri Lanka on 5 May 1973, it was only registered with the High Court of Malaya on 12 June 1984.

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[16] Attempting to transfer the said property with the Power of Attorney, the 1st respondent encountered the following problem which he informed the appellant by letter on 10 February 1984:

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> Mother, there is a small problem in transferring the name in the Seremban Land Title. When I gave the Land Title to our Lawyer, he told me that your name in the Land Title appears as THANGRATNAM D/O VYTHILINGAM whereas in the Power of Attorney which I received from you, your name appears as THANGRATNAM RAJA RATNAM. Because of the difference in
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> the names, the Land Office reject your application to transfer the name. If you do a statutory Declaration saying that both the names are refering (sic) to yourself, then only we can transfer the name. Together with this, I'm enclosing a sample of Statutory Declaration Form. So you do a declaration as above and send to me. Then only can I do the necessary things for transfer.

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[17] On 27 February 1984, the appellant executed a statutory declaration in Sri Lanka before a Notary Public to rectify the inconsistency regarding her name in the document of title with that stated in the Power of Attorney and forwarded it to the 1st

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respondent. With the aid of this statutory declaration, and in his capacity as the appellant's attorney, the 1st respondent on 19 March 1984 transferred the said property not to himself but to the 2nd respondent and himself as trustees for the 3rd respondent. Effectively, the 3rd respondent became the beneficial

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registered proprietor of the said property.

The Appellant's Claim

[18] The appellant took issue on this and filed this action. She

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claimed that she has never consented to transfer the said property to the 3rd respondent and asserted that the 1st and 2nd respondent had "wrongfully and fraudulently transferred" the said

property for love and affection to the 3rd respondent. In para. 7 of her statement of claim, the appellant asserted that by "a letter dated 23 December 1983, the 1st defendant (1st respondent) wrongfully, unlawfully and fraudulently conspired and agreed together with the 4th defendant (the 4th respondent) to cheat and defraud the plaintiff (the appellant) of her land in Grant for Land No. 1199, Lot No. 392 in the Mukim of Rasah, Daerah Seremban". Because of these, in paras 14 of her statement of claim, she requested for:

(a) A Declaration that the Transfer made between the 1st Defendant to the 2nd Defendant as Trustee for the 3rd Defendant is *ultra (sic) vires*, illegal and void;

(b) A mandatory Order that the 2nd Defendant shall forthwith re-transfer the property held under Grant for Land No. 1199, Lot No. 392 in the Mukim of Rasah, Daerah Seremban transferred under Presentation No. 5108/ 84, Jilid 1020, Folio 38 to the plaintiff free from encumbrances;

(c) An Order that the 1st, 2nd and 3rd Defendants do pay to the Plaintiff sums of money which is due to the Plaintiff upon taking of the said accounts;

(d) An order that the 1st, 2nd and 3rd Defendants pay to the Plaintiff all such sums of money by way of income received from the said property upon the taking of the said accounts and for repayment of all sums of money to the Plaintiff with interest at 12% per annum ...

The High Court's Ruling

[19] The High Court after a full trial dismissed the appellant's claim. The learned trial judge was firstly of the view that if the appellant had intended to transfer the said property to the 1st respondent as indicated by the Power of Attorney and her letter to the 1st respondent dated 23 December 1983, then there is no restriction on the 1st respondent to transfer it straight to his son. The learned trial judge then went on to elaborate that though the Power of Attorney did not give authority to the 1st respondent to transfer the said property to himself but the appellant's letter of 23 December 1983 would have overcome this shortcoming. To support this proposition, he cited amongst others, the case of *Reckitt v. Barnett, Pembroke & Slater Ltd* [1929] AC 176. In addition, the learned trial judge found that since the appellant had

A not pleaded s. 340 of the National Land Code (NLC), she could not claim that the transfer of the said property to the current registered proprietors is invalid due to inadequacy in the instrument of transfer. The learned trial judge then held that since the appellant has failed to prove beyond reasonable doubt that
B fraud was perpetuated against her by the relevant respondents, her claim is dismissed.

Appellant's Contention

C **[20]** Before us, the appellant only submitted on one ground: "The learned trial judge erred in law and fact in finding that the powers contained in the General Power of Attorney dated 5 May 1973 can be cured and/or substituted by a letter of the Donor to give extra Power to the 1st respondent/defendant to transfer the land to himself as trustee for the third respondent when the first
D respondent fails to comply with s. 3(1)(a) of the Power of Attorney Act 1949 and s. 309-311 of the National Land Code 1965".

Analysis

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[21] From this contention, it is obvious that the appellant is utilizing the approach adopted by the learned trial judge to challenge the validity of the transfer of the said property by the 1st respondent to the 3rd respondent. In short, what she is
F saying is that when the Power of Attorney does not provide authority to the 1st respondent, the appellant's letter of 23 December 1983 cannot remedy this. This argument obviously arose from the approach adopted by the learned trial judge as one of his grounds in arriving at his decision. But in my opinion this
G approach of the learned trial judge is incorrect in the face of the chronology of events. The authority for the 1st respondent to transfer the said property is not grounded on the Power of Attorney. It came from the appellant's letter to the 1st respondent dated 23 December 1983 which authorizes the 1st respondent to
H transfer the said property to himself. Whether the 1st respondent could transfer it to his son and not himself is a matter which I shall be coming to shortly. But as far as the authority to transfer is concerned it is based on the appellant's letter of 23 December 1983. The Power of Attorney, in my opinion, was only an
I instrument to arm the 1st respondent with power to execute the

memorandum of transfer and other relevant documents in order to give full effect to the transfer of the said property. Clause 4 of the Power of Attorney caters for this when it says that in "the event of any such purchase, sale ... to sign and execute and deliver all deeds and other writings necessary for giving effect and validity to the same respectively ...". And this instrument (the Power of Attorney) only came about after the appellant's letter of 23 December 1983. This is detected from the 1st respondent's subsequent letter to the appellant dated 10 February 1984 which says "whereas in the Power of Attorney which I received from you your name appears as ..." Another indication that the Power of Attorney was given to the 1st respondent subsequent to the appellant's letter of 23 December 1983 is the registration of this instrument with the High Court of Malaya on 12 June 1984. Though this Power of Attorney was executed by the appellant in Sri Lanka at an earlier date, but to be effective in this country it was from the date of registration with our High Court. Approaching this matter from this angle ie, that it was the appellant's letter of 23 December 1983 that gave the authority to the 1st respondent to transfer the said property and the Power of Attorney was only an instrument to effect the transfer, then there is no issue of the appellant's letter of 23 December 1983 providing "extra power" to the 1st respondent to transfer the said property. The 1st respondent was already well equipped with authority to transfer and was only using the Power of Attorney to execute the relevant memorandum of transfer and other relevant and necessary documents to give full effect to the transfer. So the question of "extra power" through the appellant's letter dated 23 December 1983 to be loaded onto the Power of Attorney does not arise. The learned trial judge has relied on the wrong sequence of facts.

[22] Though the learned trial judge is wrong in his approach but it is my opinion that this does not affect the outcome of his decision in dismissing the appellant's claim. The main crux of the appellant's claim is whether the 1st respondent can transfer the said property to his son rather than the manner in which it was done. On this issue, I agree with the learned trial judge that once the appellant had given authority to the 1st respondent to transfer the said property to himself, the 1st respondent has every right to have the said property transferred to whoever he nominates. The authority given by the appellant to the 1st respondent amounts to

a gift by the mother to her son and once given, the son can elect to nominate whoever to be the registered proprietor. The appellant cannot object to this. As the answer to this issue is against the appellant, the learned trial judge has not erred in finding against the appellant.

Conclusion

[23] For reasons aforesaid, I dismissed the appeal with costs. Deposit for this appeal to the respondents towards account of taxed costs.

[24] My sister Justice Zaleha Zahari has read this judgment in draft and has concurred with the contents therein.